85-1909

Supreme Court, U.S.
FILED
MAY 16 1986
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

WILLIAM MOSLEY
Petitioner,
vs.
UNITED STATES OF AMERICA
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Counsel for Petitioner
ARTHUR J. TARNOW of the
Michigan and United States
Supreme Court Bars
610 Lafayette Building
Detroit, Michigan 48226
(313) 963-4090

THE AMERICAN PRINTING COMPANY
615 SECOND AVENUE, DETROIT, MICHIGAN 48226 — (313) 963-9310

NLO PP

QUESTION PRESENTED

WAS THE INDICTMENT CONSTITUTIONALLY DEFECTIVE, BECAUSE IT DID NOT SET FORTH WHAT THE THEORY OF FRAUD CHARGED WAS, THUS, DENYING MR. MOSLEY ADEQUATE NOTICE OF THE CHARGED OFFENSE. *RUSSELL V UNITED STATES*, 369 US 749 (1961).

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	1
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	6
CONCLUSION	8
EXHIBIT A — ORDER OF THE SEVENTH CIRCUIT COURT OF APPEALS	1a
EXHIBIT B — OPINION OF THE DISTRICT COURT OF THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION	12a
EXHIBIT C — STIPULATION OF FACTS	15a
EXHIBIT D — INDICTMENT	29a

TABLE OF AUTHORITIES

Page

Cases:

Epstein v United States, 174 F2d 154 (6th Cir. 1949) 6, 7

Russell v United States, 369 US 749 (1961) 6, 7

Statutes:

18 USCA §2314 ..... 3, 5

18 USCA §371 3

Constitutions:

United States Constitutions, Amendments V and VI 2

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1985

No.

WILLIAM MOSLEY,
Petitioner,
VS.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, William Mosley, respectfully requests that a Writ of Certiorari issue to review the Judgment and Order of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The Order of the Seventh Circuit Court of Appeals is reported and is attached as exhibit A. The opinion of the District Court for the Northern District of Illinois Eastern Division is attached as exhibit B. The Stipulation of Facts is attached as exhibit C. The Indictment is attached as exhibit D.

JURISDICTION

The Judgment of the United States Court of Appeals for the Seventh Circuit was entered on March 26, 1986. This Petition for Certiorari is within sixty days of that date.

The Jurisdiction of the Court is invoked under 28 USC §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> "No person shall be held in answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor be deprived of life, liberty or property, without due process of law; . . . ."

The Sixth Amendment to the United States Constitution provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . .; and to be informed of the nature and cause of the accusation. . . .".

STATEMENT OF THE CASE

This criminal case arose in connection with the operation of a nonprofit corporation, Afro-Youth Community, Inc. (hereinafter AYC), a residential care provider for teenage boys under a contract with the Illinois Department of Children and Family Services (hereinafter DCFS). Appellant William Mosley was Chairman of the AYC Board of Directors and co-defendant Robert Brantley (tried separately) was its Executive Director. AYC operated from approximately January 1976 to approximately February 1980.

There were a total of four indictments against Mr. Mosley which arose from his doing a "profit" business with AYC allegedly without disclosing his ownership of the "profit" corporation to the Board of Directors of AYC.

Mr. Mosley's motion to dismiss the Second Superceding Indictment was granted by the trial court of January 6, 1984, wherein the trial court noted that ". . .(i)t would be disastrous if business crimes of this nature could be charged merely with the words 'taken by fraud' "(R 80, p. 7). The trial court also noted that "in the present case, the physical

check in question was not taken by fraud (.)" — [R 80, p. 14].

The first furniture rental check was received by National Furniture and Equipment Leasing Company (hereinafter NFEL) in 1977 and approximately the last rental check, the check for which Mr. Mosley was charged with knowing transporting in interstate commerce, was received in January 1980.

The Government filed its Third Superceding Indictment on January 23, 1984 (Exhibit D), and it is on this Indictment that Mr. Mosley went to trial on stipulated facts. On April 23, 1984, Mr. Mosley was convicted, as charged, by the trial judge, sentenced July 10, 1984 to 14 months incarceration to be followed by 5 years probation and ordered to pay restitution of $50,000. Prior to sentencing, Mr. Mosley timely filed post-trial motions in arrest of judgment, for judgment of acquittal, and for new trial.

STATEMENT OF FACTS

At Mr. Mosley's bench trial held April 23, 1984, the government went beyond the facts stipulated to (Appendix C) by arguing a new theory of guilt. As a result, the trial court relied upon arguments and a new theory to find that Mr. Mosley had violated the National Stolen Property Act (18 USCA 2314) and Conspiracy to violated the same (18 USCA 371).

The stipulation of fact was to be sole evidence for use at the trial.

The government's argument for defendant's guilt which was based upon facts not charged in the Indictment or stipulated to during trial are as follows:

A. The "bill of sale" for the furniture and vehicle transaction and the "escrow account" maintained by defendant Mosley. (Bench Trial Transcript, April 23, 1984, pages 55-56, 57 and 65, hereinafter Tr).

B. That AYC rental checks were not really being mailed to Collierville, Tennessee but to Detroit. (Tr 58-59). (The government stipulated that the checks were going to Collierville in Stipulation paragraphs 8 and 9.)

C. That defendant Mosley is shown on the incorporation documents as registered agent only. (Tr 59) (Stipulation paragraph 14 specifically state and the incorporation documents show defendant as president NFEL.)

D. That Ruby Alexander was president of NFEL. (Tr 59, 63).

E. That defendant Mosley was legal counsel for AYC and was running the operation. (Tr 62). (Stipulation paragraph 10 state that Robert Brantley was president and executive director of AYC.)

F. That defendant Mosley was 100% owner of NFEL. (Tr 58). (Stipulation paragraphs 1 and 14 show an interest in Ruby Alexander and Myles Newborn.)

These asserted facts (A thru F), either not a part of the stipulation or an incorrect statement of the stipulated facts, were relied upon by the trial court in finding Mr. Mosley guilty as charged. (Tr 80, 83-84). With respect to the "bill of sale", defendant objected to it use and/or consideration during trial (Tr 56); however, the trial court did read and consider the bill of sale and found the element of criminal intent almost solely upon this item and the exorbitant profit. (Tr 83-84). Further, the trial court found the element of "concealment" upon the government's assertion that Ruby Alexander was president of NFEL (stating that Ruby Alexander was made president of NFEL in order for defendant Mosley to conceal his interest in NFEL). (Tr 80).

Before making specific findings of fact and conclusions of law, the trial court listed the elements of interstate trans-

portation of a security obtained by fraud under the National Stolen Property Act (18 USCA 2314) as follows:

> "A duty to disclose Mr. Mosley's interest in NFEL. Two, a failure to disclose that interest. Three, materiality. Four, a scheme to defraud, which would include necessarily injury to the victim. And Five, a reasonable forseeable transportation of the check in interstate commerce". (Tr 79).

After Mr. Mosley's trial, several post-trial motions were filed by Appellant Mosley; and at the hearing held July 10, 1984, the trial court denied Mr. Mosley's post-trial motions without reference to the five elements identified during the bench trial of Mosley or the jury trial of Brantley. Additionally, the conviction was sustained without reference to the questioned bill of sale and escrow account and the factual misstatements of the government. The trial court thus possibly sustained Mr. Mosley's conviction and denied his post-trial motions on a different theory and approach than that taken at his trial; namely, the trial court affirmed Mr. Mosley's conviction as follows:

> "I already made the point during argument that a distinction can and must be drawn between the evidence of failure to disclose and the evidence of actual concealment and active concealment which I found as pertinent to the intent to defraud issue, but that's an important concept and I would like to repeat it here.
>
> ***
>
> "I would find that there was a 300 percent profit or a 300 percent markup, and that that difference between the sale price and the lease back price supports a finding of intent to defraud AYC.
>
> "It supplies the defendant's motive, which was to realize this difference in the sale price and the lease

back price for his own benefit and the benefit of M. Brantley."

* * *

". . . (T)he use of Ruby Alexander by Mr. Mosley was to conceal his own ownership interest and his own personal involvement in this lease agreement, and it was designed specifically by Mr. Mosley to actively conceal his own involvement".

"So I would deny the motions for new trial. The two exhibits which are in dispute, while probative evidence, are not the only evidence in the case on the issue of intent to defraud, and I would adopt Mr. Raphaelson's argument in this respect." (Exhibit B).

REASONS FOR GRANTING THE WRIT

The decision below conflicts with decisions of this Court and may be read to create a split of opinion in the Circuit Court of Appeals.

The affirmance of Mr. Mosley's conviction based on an indictment which did not state what the theory of fraud was violates the constitutional notice requirement of *Russell v United States*, 369 US 749 (1961).

In *Epstein v United States*, 174 F2d 154 (6th Cir, 1949), the Sixth Circuit Court of Appeals reversed a conviction of mail fraud where the indictment alleged the fraud in charging excessive prices by a director to his corporation. The Government had switched its theory of fraud to breach of fiduciary duty to the corporation by concealing the self dealing. The Court reasoned that the change of theory was fatal variance from the Indictment, which violated the constitutional notice requirement.

The Court also noted not all self dealing by a corporate director was illegal civilly or criminally. There had to be a criminal intent to make it a crime.

In Mr. Mosley's case the Indictment alleged facts that included an inference of excessive profits and a failure to disclose his interest in the corporation doing business with AYC. However, while the indictment was ambiguous, the Government indicated at the start of the trial that it was the failure to disclose his interest, while at the end of the trial it seemed the Government was arguing excessive profits as actual fraud.

The prejudice to Mr. Mosley was that the Government was able to switch from a charge where good faith dealing was a defense to failure to disclose to a charge where the reasonableness of the contract consideration, given the risk, was a defense.

Mr. Mosley could have argued his good faith as to constructive fraud by showing the corporation supplying the furniture had listed him as President in the incorporation papers publicly filed and he was acting in good faith.

As to the actual fraud theory, Mr. Mosley could have argued the Government's failure to provide any evidence of the standard of profit in the furniture rental business, where the organization renting the furniture was subject to third party funding, which was not guaranteed. That is, since Mr. Mosley assumed the risk of supplying furniture to an organization not guaranteed to be funded, the level of mark up may have been substantially higher. There was no evidence on this point by the Government.

In summary, the failure of the Indictment to specify the theory of Fraud violated the rule of *Russell, supra* and *Epstein, supra*; thus, conflicting with decisions of this Court and a decision of the Sixth Circuit Court of Appeals. Therefore, Certiorari should be granted.

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

ARTHUR J. TARNOW of the
Michigan and United States
Supreme Court Bars
610 Lafayette Building
Detroit, Michigan 48226
(313) 963-4090

Dated: May 16, 1986

EXHIBIT A

Order of the Seventh Circuit Court of Appeals

JUDGMENT — ORAL ARGUMENT
United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

March 26, 1986.

Before

Hon. WILLIAM J. BAUER, *Circuit Judge*
Hon. JOEL M. FLAUM, *Circuit Judge*
Hon. ROBERT A. GRANT, *Senior District Judge**

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 84-2228 vs.

WILLIAM MOSELY,
Defendant-Appallant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 82 CR 401
Judge Susan Getzendanner

This cause was heard on the record from the United States District Court for the Northern District of Illinois Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this date.

---

* The Honorable Robert A. Grant, Senior District Judge for the Northern District of Indiana, is sitting by designation.

In the

United States Court of Appeals

For the Seventh Circuit

No. 84-2228

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

WILLIAM MOSLEY,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 82 CR 401—Susan Getzendanner, *Judge.*

ARGUED JUNE 12, 1985—DECIDED MARCH 26, 1986

Before BAUER and FLAUM, *Circuit Judges,* and GRANT, *Senior District Judge.**

GRANT, *Senior District Judge.* Defendant-Appellant challenges his conviction, after a bench trial on stipulated facts, for two counts involving a conspiracy to commit fraud against a federally funded youth program. An indictment charged defendant-appellant and co-defendant, Brantley, who was tried separately by a jury and whose appeal, No. 84-2131, was heard on the same day as the instant appeal, with one count of conspiring to commit

---

* The Honorable Robert A. Grant, Senior District Judge for the Northern District of Indiana, is sitting by designation.

fraud against the United States, in violation of 18 U.S.C. § 371, and one count of transporting a fraudulently obtained security in interstate commerce, in violation of 18 U.S.C. § 2314. The indictment also charged Brantley separately with four unrelated counts. We affirm the conviction.

Facts

Before trial to the bench, the parties stipulated to the facts. The stipulated facts and exhibits reveal the following:

Co-defendant, Brantley, and two other individuals founded a community youth organization in Chicago known as Afro Youth Community [hereinafter referred to as AYC]. Brantley and his co-founders designed AYC to provide programs for disadvantaged youth.

After AYC received funding from the Illinois Department of Children and Family Services in April 1976, Brantley became AYC's President and Executive Director. Brantley's friend, defendant-appellant, Mosley, a Detroit attorney, became the Chairman of AYC's Board. Mosley also owned the property that AYC rented.

AYC purchased furniture on credit from Wieboldt's Department Store, a Chicago retailer. After the Department of Children and Family Services told Brantley that they would not pay outright for the AYC furniture purchased from Wieboldt's, except on a yearly pro-rated basis, Brantley and Mosley raised the alternative of leasing AYC's furniture with the other AYC Board members. Mosley indicated that he would investigate various leasing firms and find a suitable candidate.

A short time later, Mosley and Brantley stated that AYC would lease its furniture from National Furniture and Equipment Leasing Company [hereinafter referred to as National Furniture]. As part of the agreement, National Furniture purchased all of AYC's furniture and equipment and leased it back to AYC. In addition, Na-

tional Furniture reimbursed AYC for payments that AYC was making to Wieboldt's Department Store for the furniture and to the Hyde Park Bank for an automobile loan.

Unknown to the AYC Board, Mosley had created National Furniture in July 1977 when he traveled to the home of his aunt, Ruby Alexander, in Collierville, Tennessee. Mosley drafted the legal documents for the business giving Alexander's farm as the business address. National Furniture's articles of incorporation stated that Mosley was the President, Alexander was the Vice President, and Scott, Mosley's sister and a Detroit resident, was the Secretary and Treasurer. The Articles listed Newborn, Mosley's grandfather and owner of the Collierville farm, as an incorporator. Alexander's farm contained no National Furniture office, warehouse, store or inventory of furniture.

Mosley opened a business checking account at a Collierville bank listing Alexander and himself as the authorized signators. The bank sent National Furniture's account statements to Alexander and to Mosley's law office in Detroit. All the money in the National Furniture account came from AYC. Mosley told Alexander that he was investing money from the National Furniture account in both their names. Brantley became aware of Alexander's and Mosley's ownership of National Furniture in September 1977.

From July 1977, when AYC began making payments to National Furniture, to February 1980, the month that AYC lost its Department of Children and Family Services contract, AYC paid National Furniture $74,341.73 for the leasing of furniture, equipment and an automobile. AYC had originally purchased these for $15,968.80. Throughout this period, AYC remained inadequately furnished and in great need of replacement furniture.

National Furniture deposited AYC's payments in its corporate bank account, in a bank account for Moments of Truth to which Mosley's Mother was a signator and in

Mosley's law firm account. Moments of Truth received AYC checks totaling $7,316.66 and Mosley's law firm received a check in the amount of $416.66.

Out of the funds received, Mosley signed checks drawn on the National Furniture account to AYC in the amount of $5,525.40, to the Tennessee Department of Revenue in the amount of $980.28, to the Internal Revenue Service in the amount of $2,363.40, to Alexander in the amount of $1,000, to the VISA account of his law partner in the amount of $2,335.36, to Moments of Truth in the amount of $150, to West Side Unity Church, his mother's church, in the amount of $5,350, to Damon, Inc., a business owned and operated by Brantley, in the amount of $20,232.50, to Mosley & Assoc., an unidentified entity, in the amount of $9,105, to Mosley and Monroe, his law firm, in the amount of $1,597.50, to MCM Family Greeting, Inc., a company Mosley was trying to establish, in the amount of $5,000, to Mosley Legal Fees in the amount of $1,500, and to himself in the amount of $690.

After a bench trial on the stipulated facts and exhibits, the district court found Mosley to be guilty as charged. The district court denied Mosley's post-trial motions and sentenced him to fourteen months' imprisonment on Count 2. The district court suspended sentencing on Count 1 and imposed a five year period of probation on that Count to run consecutively to the sentence on Count 1. As a condition of probation, the district court ordered Mosley to make restitution in the amount of $50,000.

Issues

Mosley raises two issues on appeal:

I. Whether the indictment was sufficient to inform Mosley of the charges against him; and,

II. Whether a fatal variance exists between the facts proved and the charges in the indictment?

I. *Whether the indictment was sufficient to inform Mosley of the charges against him?*

Mosley seeks to raise claims of multiplicity and duplicity of the indictment for the first time on appeal. A party waives a claim of multiplicity if he fails to raise it before trial. *United States v. Griffin*, 765 F.2d 677, 680-82 (7th Cir. 1985). The courts require claims of duplicity to also be raised before trial. *United States v. Price*, 763 F.2d 640, 643 (4th Cir. 1985); *United States v. Lyons*, 703 F.2d 815, 821 (5th Cir. 1983); *United States v. Berardi*, 629 F.2d 723, 729 (2d Cir.), *cert. denied*, 449 U.S. 995 (1980); *United States v. Sheehy*, 541 F.2d 123, 130 (1st Cir. 1976); *Mitchell v. United States*, 434 F.2d 230, 231 (9th Cir. 1970), *cert. denied*, 402 U.S. 946 (1971); *United States v. Costner*, 359 F.2d 969, 974 (6th Cir. 1966); *Franklin v. United States*, 330 F.2d 205, 207 (D.C. Cir. 1964); *United States v. Frank*, 290 F.2d 195, 196 (3d Cir. 1961). Because Mosley failed to raise these claims at the proper time, he has waived them.

Mosley questioned the sufficiency of the indictment after the beginning of his trial. Unlike challenges for multiplicity and duplicity, a party may challenge an indictment for failure to charge an offense at any stage of the proceeding, including the appellate stage. *United States v. Esposito*, 771 F.2d 283, 288 (7th Cir. 1985), *cert. denied*, 54 U.S.L.W. 3547 (U.S. Feb. 25, 1986) (No. 85-854). However, " 'an indictment not challenged before trial will be upheld "unless it is so defective that it does not, by any reasonable construction, charge an offense for which the defendant is convicted." ' " *United States v. Gironda*, 758 F.2d 1201, 1210 (7th Cir. 1985) (citations omitted).

> In reviewing the sufficiency of an indictment, a court should consider the challenged count as a whole and should refrain from reading it in a hypertechnical manner. . . . As the Ninth Circuit stated . . . an indictment "must be read to include facts which are necessarily implied by the allegations made there-

> in. . . . Even if an essential averment in an indictment is faulty in form, if it may by fair construction be found within the text, it is sufficient."
>
> With this construction in mind, a court must interpret an indictment to determine if it fulfills three functions. First, it should state all of the elements of the offense charged; second, it should inform the defendant of the nature of the charge so that he may prepare a defense; and third, it must enable the defendant to plead the judgment as a bar to any later prosecution for the same offense.

Id. at 1209 (citations omitted).

On appeal, Mosley challenges Count 2 of the indictment which charges, in pertinent part:

> 2. On or about January 3, 1980, at Chicago, in the Northern District of Illinois, Eastern Division,
>
> ROBERT L. BRANTLEY
> and WILLIAM MOSLEY,
>
> defendants herein, knowingly caused the following security, in the form of a check of a value of $5,000 or more, to be transported from Collierville, Tennessee to Chicago, Illinois, knowing that said check had been taken from Afro-Youth Community, Inc. by fraud:
>
> Afro Youth Community, Inc.,
> Check No. 192, payable
> to NFEL, Inc., in the amount of $11,430.12
>
> In violation of Title 18, United States Code, Section 2314.

December 1983 Grand Jury Indictment at 4, Record at 84. Paragraph one of Count 2 incorporates by reference all the allegations in Count 1 which sets forth the overt acts and charges an underlying conspiracy to defraud.

For the purpose of an indictment charging interstate transportation of fraudulently taken checks, section 2314 has two essential elements: "(1) interstate transportation

of a stolen, converted, or fraudulently taken check of at least $5,000 value (2) with fraudulent intent." *United States v. Freeman*, 619 F.2d 1112, 1118 (5th Cir. 1980) (citations omitted), *cert. denied*, 450 U.S. 910 (1981); *see* 18 U.S.C. § 2314. The instant indictment plainly sets forth both of these elements. The indictment also clearly informed Mosley of the nature of the charge against him and the judgment against him bars any future prosecution for the charged offenses. We therefore conclude that a reasonable construction of this indictment reveals the charge of which Mosley was convicted; in other words, we find the indictment to be sufficient.

Mosley would include the following as essential elements of the charged offense: (1) an unlawful scheme to defraud (2) through material failure to disclose (3) by one with a duty to disclose (4) who had a particular type of criminal intent and (5) injury to AYC. Mosley is confusing his " 'constitutional right to know what offense is charged with his need to know the evidentiary details establishing the facts of such offense'. . . ." *Freeman*, 619 F.2d at 1118. When an indictment contains all the essential elements of the charged offense, the accused may obtain the factual proof supporting the charges, if vital to his defense, by a motion for a bill of particulars. Fed. R. Crim. P. 7(f); *United States v. Crippen*, 579 F.2d 340, 342 (5th Cir. 1978), *cert. denied*, 439 U.S. 1069 (1979); *Flying Eagle Publications, Inc. v. United States*, 273 F.2d 799, 802 (1st Cir. 1960); *Cefalu v. United States*, 234 F.2d 522, 524 (10th Cir. 1956); *McMullen v. United States*, 96 F.2d 574, 579 (D.C. Cir. 1938).

II. *Whether a fatal variance exists between the facts proved and the charges in the indictment?*

Mosley commingles his fatal variance challenge with an assertion that the district court improperly amended the indictment. The two theories of error have some resemblance. However, "[a] judicial amendment of the indictment, whether implicit or explicit, is *per se* reversible er-

ror, . . . while a variance in proof from the original indictment justifies reversal only when the defendant has been prejudiced." *United States v. Galiffa*, 734 F.2d 306, 311 (7th Cir. 1984) (citations omitted); *see also United States v. Kuna*, 760 F.2d 813, 817 (7th Cir. 1985). "[A]n amendment occurs when 'the offense proved at trial was not fully contained in the indictment, for trial evidence had "amended" the indictment by *broadening* the possible bases for conviction from that which appeared in the indictment.' " *Kuna*, 760 F.2d at 817-18 (quoting *United States v. Miller*, ___ U.S. ___, 105 S. Ct. 1811, 1816 (1985)). This Court has found a constructive amendment

> where a "complex set of facts" is presented to the jury during the trial which is distinctly different from the set of facts set forth in the charging instrument. *United States v. Muelbl*, 739 F.2d 1175, 1180-81 (7th Cir. 1984). Alternatively, to find a constructive amendment the crime charged in the indictment must be "materially different or substantially altered at trial, [so that] it is impossible to know whether the grand jury would have indicted for the crime actually proved." *Id.*

Kuna, 760 F.2d at 818.

Mosley again attacks Count 2. He asserts that the trial court amended the indictment by adding what he perceives to be the essential elements of a section 2314 violation. As noted in Issue I, *supra* at pp. 6-8, Count 2 does set forth the essential elements of a section 2314 violation. Having reviewed the indictment, the stipulated facts, the trial exhibits and the trial transcript in the instant case, this Court finds that no "complex set of facts" existed in Mosley's trial which differed from the facts charged in Count 2 of the indictment. While the indictment does not charge a particular type of fraud by name, it does outline Mosley's relationship with AYC, the establishment of National Furniture by Mosley, the agreement between National Furniture and AYC upon Mosley's proposal, the profit reaped by National Furniture from the AYC agree-

ment, Mosley's failure to disclose his interest in National Furniture to AYC, and the receipt of AYC funds by Mosley through National Furniture. The Government proved these at trial and we, as did the district judge, find them sufficient to establish fraud. Such a finding does not require reliance upon a complex set of facts distinctly different from those charged in the indictment.

"A variance occurs when the terms of the indictment are unaltered, but the evidence offered at trial proves facts materially different from those alleged in the indictment." *Galiffa*, 734 F.2d at 312 (citation omitted). "A variance between allegation and proof is not fatal unless the defendant has been thereby deprived of an adequate opportunity to prepare a defense or has been exposed to a risk of being prosecuted twice for the same offense." *Kuna*, 760 F.2d at 819 (citations omitted).

Our review of the indictment, stipulated facts, exhibits and trial transcript shows that the Government proved the exact facts alleged in the indictment. Therefore, no variance exists. Mosley's argument really challenges the inferences that the district judge drew from the evidence in finding that Mosley intended to defraud AYC. In considering this claim, we review the evidence and all reasonable inferences that can be drawn from it in the light most favorable to the Government. *United States v. Moore*, 764 F.2d 476, 478 (7th Cir. 1985) (citations omitted). In so doing, this Court finds that the district court reasonably inferred that Mosley intended to defraud AYC.

Mosley's final argument has no merit. In it, he asserts that the district court used an intangible rights theory of fraud to find intent at trial and an active concealment theory of fraud to deny Mosley's motion for a new trial. At trial, the district court stated: ". . . I would find an intent to defraud has been proven by the government based on the difference between the sale price and the leaseback price, *based on the active concealment by Mr. Mosley*, and based on the injury to AYC." Transcript at 84 (Apr. 23, 1984) (emphasis added). In denying Mosley's Motion for

New Trial, the district court stated: "I don't think there is anything you can say, Mr. Gray, to persuade me that I can't take evidence of active concealment into account on the intent to defraud issue. I clearly can and did before, and I will now." Transcript at 50 (July 10, 1984). In each instance, the district court properly looked to the acts of concealment as one basis for finding intent to defraud. *United States v. O'Boyle*, 680 F.2d 34, 36 (6th Cir. 1982) (citations omitted); *United States v. White*, 673 F.2d 299 (10th Cir. 1982).

Conclusion

Mosley's conviction is AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

USCA 60054—Midwest Law Printing Co., Inc., Chicago—3-26-86—450

EXHIBIT B

OPINION OF THE DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

(59)

* * * to me without objection from either side to either my referral to these documents or the fact that I was looking at them.

It's clear from the transcript and from my own recollection of events that both counsel used these documents in argument as though they were part of the evidence in the case.

So that would be my finding, that they were part of the record. But nevertheless, we have agreed all among us to consider the motion for a new trial on the grounds that these documents were not part of the stipulated record, and the government has had no objection to that.

MR. RAPHAELSON: That's correct, your Honor.

THE COURT: I have heard new argument from counsel for both sides on the evidence of this case without reference to these two exhibits, and I have reached a conclusion that the defendant's motion for a new trial must be denied, and it is denied.

The factual argument presented by Mr. Raphaelson is the factual argument which the Court agrees with.

I would like to make just a few comments on the defendant's view of the evidence!

I already made the point during argument that a distinction can and must be drawn between the evidence of failure to disclose and the evidence of actual concealment and (60) active concealment which I found as pertinent to the intent to defraud issue, but that's an important concept and I would like to repeat it.

The next question relates to the difference between the sale price of the furniture, some question raised by the defendant as to whether that represents a 300 percent profit.

Mr. Raphaelson persuasively argues that on the basis of the data contained in the stipulation and the accompanying exhibits, that I could reach the conclusion that that difference in price represents a 300 percent profit.

Miss Jackson referred to it as a 300 percent profit in her argument. I think basically that's her interpretation.

The interpretation of the exhibits and the stipulation with respect to the extent and nature of the profit presented by defense counsel I think is something that can be looked at by the Court. The arithmatic results in a 300 percent difference between the sale price and the lease back price, and it is a small step to call that the profit realized by the defendant.

I would find that there was a 300 percent profit or a 300 percent markup, and that that difference between the sale price and the lease back price supports a finding of an intent to defraud AYC.

(61)

It supplies the defendant's motive, which was to realize this difference in the sale price and the lease back price for his own benefit and for the benefit of Mr. Brantley.

There was some argument by defense counsel that I could not conclude on the basis of the stipulation that there was a potential of loss of funding for AYC by DCFS. I would reach the conclusion that there was a potential of loss of total finding, not only of funding for the lease, but of total funding for AYC.

I think had DCFS found out about Mr. Mosley's involvement, it would have led to a decision by DCFS not to do business with Mr. Mosley, and accordingly not to fund AYC. I reach that as just an inference and use of common sense based on the evidence that has been stipulated.

Defense counsel argued today that there would be a fair inference that the Board of AYC was in fact told of Mr. Mosley's ownership of NFEL. I resoundingly reject that.

That's not a fair inference. I think all of the evidence points to the conclusion that the Board was not informed of Mr. Mosley's conflict of interest.

Defense counsel argues that the use of Rubie Alexander as a nominee supported a conclusion of some legitimate business.

I reject that as an inference. The use of Rubie Alexander by Mr. Mosley was to conceal his own ownership interest and his own personal involvement in this lease agreement, and it was designed specifically by Mr. Mosley to actively conceal his own involvement.

So, I would deny the motions for new trial. The two exhibits which are in dispute, while probative evidence, are not the only evidence in the case on the issue of intent to defraud, and I would adopt Mr. Raphaelson's arguments in that respect.

We will proceed to the sentencing. I do have another sentencing which will go first.

We will ask the probation officer — in fact, I think my clerk probably anticipated me and just left to ask the probation officer to be present.

We will proceed to sentencing after this next sentencing.

MR. DURKIN: Your Honor, I called Mr. Snow in anticipation when you said that if there was going to be a denial there would be a sentencing today. He apologizes, but he cannot be here this afternoon.

THE COURT: All right. Well, Mr. Snow has prepared a presentence report which I — he didn't prepare it, he gave me a presentence report prepared out of Detroit which I have read.

EXHIBIT C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA

v.

No. 82 CR 401
Judge Susan Getzendanner

WILLIAM MOSLEY

STIPULATION

IT IS HEREBY AGREED by, among and between the parties, the UNITED STATES OF AMERICA, by its attorney DAN K. WEBB, United States Attorney for the Northern District of Illinois and defendant WILLIAM MOSLEY, individually and through his attorney, MARIANNE JACKSON as follows:

1. If called to testify, Ruby Alexander would identify the defendant as her nephew. She would further testify that in or about July, 1977, she became an officer of National Furniture Equipment Leasing Inc. (NFEL), a Tennessee Corporation, at the defendant's request and that she became a signator to the corporate account at the First Tennessee Bank, Colliersville, Tennessee which account number was 21-0162701. The other authorized signature on that account was the defendants. Both she and the defendant had individual check writing capabilities on the account. The corporate address, 8345 Center Hill Road, Collierville, Tennessee, was that of the farm where Alexander lived. No office, warehouse or store existed there, nor did any inventory of furniture exist there. Bank statements on NFEL's account were sent to her and to defendant's law office in Detroit. In August or September, 1977, she met with defendant and co-defendant Robert Brantley in Detroit and discussed NFEL's business relationship with Afro Youth Community (AYC) wherein it was disclosed to Brantley that she and Mosley owned NFEL. The only client NFEL had was AYC and all monies deposited to the NFEL account were from that client as far as she knew. She was unaware of any NFEL

business with Damon, Inc. Mosley told her that MCM Family Greeting Card Co. was a company that he was trying to set up. She does not believe NFEL purchased its furniture from AYC, but she did sign checks going back to AYC (Group Exhibit One). She does not know what happened to the monies deposited to NFEL's account beyond the checks she wrote to AYC and to herself, except that Mosley told her that he was investing the money in both of their names. As far as she knew, NFEL never contracted for consulting services with anyone. West Side Unity Church was the name of Ruth Mosley's church. Ruth Mosley is defendant's mother, and Pearl Scott was the defendant's sister, both of whom live in Detroit. Myles Newborn, Sr. was the grandfather of the defendant and the owner of the farm at 8845 Center Hill, Collierville, Tennessee.

2. If Robert Wohlagemuth were called to testify, he would testify that he was a Contracts & Grants Officer with the Department of Children and Family Services (DCFS) who negotiated with AYC through AYC's president/executive officer Robert Brantley for DCFS funding of AYC programs for disadvantaged youth. Said funding was granted and included funding for rental of furniture and equipment after Brantley was told that DCFS would not pay outright for AYC furniture purchases except on a yearly prorrated basis. DCFS funding of AYC began in or about 1976 and ended in or about February, 1980. DCFS was unaware of Mosley's interest in NFEL and would not have approved leasing payments to a company he held an interest in.

3. Walter Lyons would testify that he was told by the defendant and Brantley to consult the NFEL file for AYC furniture leasing costs (Group Exhibit Two). Lyons was a bookkeeper at AYC from January, 1973 to about May, 1979. Around June, 1973 he prepared a worksheet which reflected AYC payments for furniture rental from NFEL, as well as AYC purchases of furniture throughout the period covered by his audit. (Exhibit Three). He was unaware of any interest by defendant or Brantley in NFEL.

4. Robbyn Washington, Michael Bennett, E. Duke McNeil, and Cathy Ogletree, AYC board of director members, would testify that they were unaware of Mosley's interest in NFEL and would have questioned AYC rentals from NFEL if they had been informed. They were also unaware of NFEL payments to Damon Inc., which was owned and operated by Brantley. They would have questioned this as well. Robbyn Washington would further testify that NFEL checks bearing his signature were signed in blank by him, as he trusted Brantley to fill them out and countersign them properly. He does not recall knowingly signing a check payable to NFEL.

5. John Holiman and Olivia Chase, who at various times were members of AYC's board of directors and were personnel director and case-worker manager, respectively, would testify that they were unaware of Mosley's interest in NFEL and would have questioned AYC rentals from NFEL if they had known. Both signed checks to NFEL but did not keep track of the amounts. Chase questioned Brantley as to what she viewed as "high cost" and Brantley told her leasing was expensive. Holiman saw no furniture at AYC beyond what he and other AYC members purchased from Wieboldts and other sources with AYC money and which he believed was sold to NFEL by Brantley. The original furniture cost he would estimate at about $10,000 with additional purchases not exceeding $5,000. Holiman would further testify that during the existence of AYC, there were shortages of furniture continuously. Olivia Chase would also testify that when DCFS funding first came up, Brantley told the AYC board that he had to look into leasing their furniture because DCFS would not pay for the furniture outright. Defendant said he would take care of finding the leasing company. Shortly thereafter the defendant and Brantley stated at a board of directors meeting that AYC would lease furniture from NFEL. The defendant's ownership of NFEL was not mentioned at this or any other board of directors meeting.

6. Moments of Truth had a bank account number 1-149454-9 at the Bank of the Commonwealth to which Ruth Mosley was signator.

7. Sharon Data would testify that she was defendant's law partner at one time and that he reimbursed her $2336.36 for an office furniture purchase by paying her VISA bill account 4673-020-545-919 with an NFEL check.

8. Group Exhibit Four are AYC checks payable to NFEL deposited to NFEL's Colliersville bank account.

9. Chart A reflects dispursements through checks signed by defendant from NFEL's account and AYC checks payable to NFEL which were not deposited to NFEL's Colliersville Bank account.

10. Defendant was chairman of the board of directors of AYC. Brantley was president/executive director. Bennett, Washington, Holiman and Chase would further testify that they believe that Mosley and Brantley owned a fiduciary duty of loyalty and honesty to AYC, a non-profit Illinois corporation.

11. During 1978, defendant maintained a bank account at Bank of the Commonwealth, number 1-144645-7 for his law practice Mosley and Monroe, P.C.

12. The check charged in Count Two was deposited to NFEL's Colliersville, Tennessee bank account which bank sent it through interstate commerce to Chicago, Illinois for collection in the ordinary course of its business.

13. Exhibit Five is the official minutes of the board of directors meetings of AYC, which contains no reference to the ownership of NFEL.

14. Exhibit Six is a certified copy of the articles of incorporation of NFEL, which state that William Mosley is the president of the corporation, Rubie Alexander is the vice president; and the secretary/treasurer is Pearl Scott. Myles

Newborn, Sr. was also listed as an incorporator. Robert Brantley was not a corporate officer or shareholder of NFEL.

15. NFEL purchased certain of AYC's existing furniture and a vehicle for approximately $15,568.80. As part of this agreement, NFEL paid AYC $5,236 in cash and made installment payments to pay the $10,282.80 balance. AYC then agreed to lease the furniture and the vehicle from NFEL on a monthly basis.

NFEL payments to AYC and AYC payments to NFEL, a, well as AYC payments to Wieboldts for furniture and Hyde Park Bank for the vehicle described above are reflected on the charts attached hereto.

Over the objection of the government on relevance grounds:

a. Jackie Hearns, a member of the board of directors of AYC, Holiman and Chase would all testify that at various times they were aware of defendant's interest in the buildings leased to AYC for the Masal Village and I.L.A. (see attached leases offered by defendant over government's objection).

b. Hearns would further testify that he was aware that defendant had an ownership interest in NFEL and that AYC leased furniture from NFEL, though not necessarily the total amount paid.

He would further say that in addition to his relationship with Mosley at AYC, he had a personal relationship. He therefore does not know whether he gained this knowledge at a formal Board meeting or through informal conversations with the defendant.

STIPULATED and AGREED:

DAN K. WEBB
United States Attorney

BY:

IRA H. RAPHAELSON
Assistant U.S. Attorney

WILLIAM MOSLEY
Defendant

BY:

THOMAS M. DURKIN
Assistant U.S. Attorney

MARIANNE JACKSON
Attorney for Defendant

CHART A-1

AYC CHECKS PAYABLE TO NFEL

	Date	Amount	Deposited to:
2544	7/22/77	$ 1,850.00	NFEL Account, Colliersville
2545		450.00	
2546		416.66	
2635	8/ 3/77	$ 1,850.00	NFEL Account, Colliersville
2636		450.00	
2637		416.66	
2988	9/14/77	1,850.00	NFEL Account, Colliersville
2987		450.00	
2986		416.66	
3318	10/ 7/77	$ 416.66	NFEL Account, Colliersville
3317		450.00	
3316		1,850.00	
3617	11/16/77	$ 1,850.00	NFEL Account, Colliersville
3618		450.00	
3619		416.66	
3980	12/23/77	$ 1,850.00	NFEL Account, Colliersville
3981		450.00	
3982		416.66	
4264	1/26/78	$ 1,850.00	Moments of Truth
4265		450.00	
4266		416.66	
4684	3/10/78	$ 3,700.00	Moments of Truth
4685		900.00	
4686		833.32	NFEL Account, Colliersville
5045	4/17/78	$ 416.66	Mosley & Monroe
5046		450.00	
5047		1,850.00	NFEL Account
5228	5/ 1/78	$ 1,850.00	NFEL Account
5229		450.00	
5230		416.66	
5737	6/12/78	$ 1,850.00	NFEL Account
5736		450.00	
5735		416.66	
6275	7/19/78	$ 1,850.00	NFEL Account
6345	8/14/78	$ 1,960.04	NFEL Account
6346		733.12	
6687	9/15/78	$ 574.89	NFEL Account
6686		1,905.02	

	Date	Amount	Deposited to:
7065	10/27/78	$ 574.89	NFEL Account
7066		1,905.02	
7127	11/ 2/78	$ 574.89	NFEL Account
7128		1,905.02	
7459	12/ 1/78	$ 574.89	NFEL Account
7719	12/28/78	1,905.02	
8082	2/ 5/79	$ 1,905.02	NFEL Account
8083		574.89	
8307	3/ 5/79	$ 1,905.02	NFEL Account
8308		574.89	
8667	4/ 2/79	$ 1,905.02	NFEL Account
8668		574.89	
8923	4/30/79	$ 1,905.02	NFEL Account
8922		574.89	
9289	6/ 1/79	$ 1,905.02	NFEL Account
9290		574.89	
192	12/26/79	$11,430.12	NFEL Account
193		3,449.34	
003		(4,556.46)	
END OF DEPOSITS		($78,898.19)	
Net Payments:		$74,341.73	

CHART A-2

NFEL Checks Signed In The Name of Mosley

Number	Date	Amount	Payee	Deposited to:
001	7/15/77	$ 100.00	Damon Inc.	Bank of Commonwealth 1-148794-9 (BOC)
002	7/1/77	5,286.00	AYC	AYC Escrow
003	7/15/77	908.33	Damon Inc.	BOC
004	7/15/77	239.40	AYC	AYC Escrow
006	7/15/77	135.60	Damon Inc.	BOC
007	7/15/77	102.00	Mosley & Monroe	
	7/30/77	408.00	Mosley & Monroe	
009	8/8/77	135.60	Damon Inc.	BOC
012	8/8/77	908.33	Damon Inc.	BOC
125	9/30/80	690.00	Mosley	
129	9/22/77	908.33	Damon Inc.	BOC
130	10/14/77	908.33	Damon Inc.	BOC
131	11/28/77	908.33	Damon Inc.	BOC
132	1/10/78	908.33	Damon Inc.	BOC
133	2/22/78	187.50	Mosley & Monroe	BOC
134	2/1/78	908.33	Damon Inc.	BOC
135	3/1/78	908.33	Damon Inc.	BOC
136	4/1/78	908.33	Damon Inc.	BOC
137	5/1/78	908.33	Damon Inc.	BOC
139	6/20/78	900.00	Mosley & Monroe	BOC
140	7/24/78	500.00	Damon Inc.	BOC
141	8/22/78	395.98	Tennessee Dept. of Revenue	
142	8/22/78	725.40	IRS	
160	9/28/78	500.00	Damon Inc.	BOC
161	10/6/78	250.00	Mosley & Assoc.	BOC
163	11/16/78	2,335.36	NFB/VISA	FNB
164	11/20/78	1,500.00	Damon Inc.	BOC
165	1/6/79	150.00	MOTS	West Side Unity Church Account
166	1/10/79	500.00	Damon Inc.	Harris (Damon)
167	1/1/79	500.00	Ruby Alexander	
168	1/15/79	500.00	Ruby Alexander	
169	2/10/79	500.00	Damon Inc.	Harris

Number	Date	Amount	Payee	Deposited to:
170	3/8/79	500.00	Damon Inc.	Harris
171	4/4/79	500.00	Damon Inc.	BOC
172	6/22/79	5,100.00	West Side Unity Church	West Side Unity Church Account
173	5/31/79	500.00	Damon Inc.	BOC
174	6/30/79	500.00	Damon Inc.	BOC
175	6/30/79	1,350.00	Mosley & Assoc.	BOC
176	7/20/79	584.30	Tennessee Dept. of Rev.	
177	7/20/79	1,638.00	IRS	
191	10/1/79	3,187.50	Mosley & Assoc.	BOC
196	2/15/80	5,278.00	Damon Inc.	BOC
197	12/31/79	250.00	West Side Unity Church	West Side Unity Church Account
199	2/29/80	112.50	Mosley & Assoc.	BOC
200	5/30/80	1,425.00	Mosley & Assoc.	BOC
201	5/30/80	5,000.00	MCM Family Greeting Inc.	BOC
202	9/3/80	500.00	Mosley Legal Fees	BOC
210	2/1/81	2,780.00	Mosley & Assoc.	BOC
211	2/2/82	1,000.00	Mosley Legal Fees	

CHART B

NFEL Checks Signed By R. Alexander Payable to AYC

Date	Amount	Check No.
9/2/77	$1,553.80	101
10/1/77	564.40	102
11/1/77	564.40	103
12/1/77	564.40	104
1/1/78	564.40	105
2/1/78	564.40	106
3/1/78	564.40	107
4/1/78	564.40	108
5/1/78	564.40	109
7/1/78	564.40	111
8/1/78	239.40	114
8/1/78	325.00	146
9/1/78	239.40	115
9/1/78	325.00	147
10/1/78	239.40	119
10/1/78	325.00	149
11/1/78	325.00	150
11/1/78	239.40	120
12/1/78	239.40	121
12/1/78	325.00	151
1/1/79	239.40	116
1/1/79	325.00	152
2/1/79	239.40	117
2/1/79	325.00	153
3/1/79	239.40	118
3/1/79	325.00	154
4/1/79	239.40	143
4/1/79	325.00	155
5/1/79	239.40	144
5/1/79	325.00	156
6/1/79	325.00	157
6/1/79	239.40	145
7/1/79	239.40	148
7/1/79	325.00	158

Date	Amount	Check No.
8/1/79	325.00	180
9/1/79	325.00	181
10/1/79	325.00	182
11/1/79	325.00	183
12/1/79	325.00	184
TOTAL:	$15,031.20	

CHART C

AYC Payments to Wieboldts

6/19/76	$160.00
7/14/76	54.00
8/11/76	325.00
9/6/76	300.00
10/5/76	325.00
11/2/76	296.00
11/30/76	325.00
12/20/76	325.00
1/15/77	325.00
2/16/77	325.00
3/23/77	325.00
4/19/77	325.00
5/19/77	325.00
6/20/77	325.00
8/8/77	325.00
9/17/77	650.00
10/27/77	325.00
11/22/77	325.00
12/22/77	325.00
1/24/78	325.00
2/16/78	325.00
3/16/78	325.00
4/15/78	325.00
5/16/78	325.00
6/20/78	315.87
TOTAL	$7,950.87

CHART D

AYC Car Payments To Hyde Park Bank

16 × 239.46 = 3831.36

10/7/77	$239.46
12/20/77	244.46
1/9/78	239.46
2/2/78	239.46
3/6/78	239.46
3/31/78	239.46
5/1/78	239.46
6/8/78	239.46
7/11/78	239.46
9/15/78	244.46
10/26/78	244.46
11/10/78	239.46
12/4/78	239.46
12/7/78	1,164.79
TOTAL:	$8,603.05

EXHIBIT D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA

vs.

ROBERT L. BRANTLEY and
WILLIAM MOSLEY

No. 82 CR 401
Violations: Title 18, United States Code, Sections 2, 371, 1001, 1341 and 2314

The SPECIAL DECEMBER 1983 GRAND JURY charges:

1. At all times material to this indictment, Afro Youth Community, Incorporated, (AYC) was a not-for-profit corporation located in Chicago, Illinois, which was incorporated to provide services for foster children. In connection with its operations, AYC received funds from various local and state agencies, including the Illinois Department of Children and Family Services (DCFS). In addition, AYC also received private funding.

2. Between January 1, 1976 and February, 1980, defendant ROBERT L. BRANTLEY served as Executive Director and as President of AYC. Between January 1, 1976, and February, 1980, defendant WILLIAM MOSLEY served as the Chairman of the Board of Directors and as Legal Counsel for AYC.

3. During the period from June, 1977, through in or about January 1980, at Chicago, in the Northern District of Illinois, Eastern Division and elsewhere,

ROBERT L. BRANTLEY and
WILLIAM MOSLEY,

defendants herein, knowingly conspired together to transport in interstate commerce from Collierville, Tennessee to Chicago, Illinois, a security in the form of a check having a value in excess of $5000, knowing the same to have been taken by fraud, in violation of Title 18, United States Code Section 2314.

4. It was a part of the conspiracy that defendants BRANTLEY and MOSLEY caused AYC to enter into contracts with DCFS which contracts provided AYC with funds to rent furniture.

5. It was a further part of the conspiracy that on or about June 20, 1977, defendant MOSLEY incorporated a furniture company — the National Furniture and Equipment Leasing Company (NFEL) — in Tennessee.

6. It was a further part of the conspiracy that during the period from July, 1977 through June, 1979 defendants BRANTLEY and MOSLEY caused NFEL to purchase certain of AYC's existing furniture and vehicles for approximately $15,968.80. As a part of this agreement, NFEL paid AYC $5,286 in cash, and made installment payments to pay the $10,682.80 balance. AYC then agreed to lease this furniture and the vehicles from NFEL on a monthly basis.

7. It was a further part of the conspiracy that during the period from September, 1977 through December, 1979, AYC rented the vehicles and substantially the same furniture from NFEL which it sold that firm for $15,968.80. AYC made rental payments to NFEL by check, which payments totalled approximately $65,000 and which exceeded the amount NFEL originally paid for the furniture and vehicles by approximately $49,000.

8. It was a further part of the conspiracy that the payments from AYC were deposited into checking account number 21-0162701 in the name of NFEL at the First Tennessee Bank, Collierville, Tennessee. The checks drawn on this account were then deposited into checking accounts controlled by defendants BRANTLEY and MOSLEY. Of these monies, defendant BRANTLEY received approximately $22,544.64 in checks made payable to a firm named Damon, Inc., which defendant BRANTLEY owned. Defendant MOSLEY received funds directly or indirectly which totalled approximately $27,367.86.

9. It was a further part of the conspiracy that the defendants BRANTLEY and MOSLEY concealed their interest in NFEL, and their receipt of funds from NFEL. from the DCFS which provided funds to AYC.

10. It was a further part of the conspiracy that the defendants BRANTLEY and MOSLEY concealed their interests in NFEL and their receipt of funds from NFEL from the Board of Directors of AYC.

OVERT ACTS

11. In furtherance of the conspiracy and to effect the objects thereof, the following acts, among others, were committed in the Northern District of Illinois, Eastern Division, and elsewhere:

(a) On or about June 20, 1977, in Nashville, Tennessee, defendant WILLIAM MOSLEY incorporated NFEL, listing the place of business of NFEL as 8845 Center Hill Road, Collierville, Tennessee.

(b) On or about July 1, 1977, at Chicago, Illinois, AYC entered into a contract with NFEL by which NFEL purchased certain of the furniture and vehicles AYC owned for approximately $15,968.80.

(c) On or about July 5, 1977, at Collierville, Tennessee, defendant MOSLEY opened a checking account, number 21-0162701, in the name of NFEL, at First Tennessee Bank, Collierville, Tennessee.

(d) On or about July 15, 1977, at Detroit, Michigan, defendant BRANTLEY opened a checking account in the name of Damon, Inc., account number 1-1489794-9 at the Bank of the Commonwealth.

(e) On or about September 29, 1977, at Detroit, Michigan, defendants BRANTLEY and MOSLEY incorporated Damon Incorporated.

(f) The act contained in Count Two of this indictment is realleged herein as an overt act.

All in violation of Title 18, United States Code, Section 371.

COUNT TWO

The SPECIAL DECEMBER 1983 GRAND JURY further charges:

1. The Grand Jury realleges and incorporates by reference herein, the allegations contained in Count One.

2. On or about January 3, 1980, at Chicago, in the Northern District of Illinois, Eastern Division,

ROBERT L. BRANTLEY
and WILLIAM MOSLEY,

defendants herein, knowingly caused the following security, in the form of a check of a value of $5,000 or more, to be transported from Collierville, Tennessee to Chicago, Illinois, knowing that said check had been taken from Afro-Youth Community, Inc. by fraud:

Afro Youth Community, Inc.,
Check No. 192, payable
to NFEL, Inc., in the
amount of $11,430.12

In violation of Title 18, United States Code Section 2314.